# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION TWENTY-FIVE SUBREGION THIRTY-THREE

TOP GRADE EXCAVATING, INC.

**Employer** 

and

RUSSELL J. HORSFIELD

Petitioner

Case 25-RD-124878

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150

Union

# **DECISION AND ORDER DISMISSING PETITION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on April 1, 2014, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine the appropriate unit in which the decertification election will be held.<sup>1</sup>

### I. ISSUE

The Petitioner seeks a decertification election within a unit comprised of the approximately seven operators employed by the Employer at its Farley, Iowa facility. The Union asserts that this is not the appropriate unit and that the appropriate unit is contained in the Union's most recent collective bargaining agreements with the Quad City Builders Association and the Associated Contractors of the Quad Cities since the Employer had previously agreed to be bound by those contracts. The Union further asserts that the bargaining units described in

Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

c. The labor organization involved claims to represent certain employees of the Employer.

d. In view of the decision to dismiss the petition, no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

those two contracts do not currently contain any employees who would be eligible to vote in a decertification election, and thus, the petition should be dismissed. The Employer asserts that the petitioned-for-unit is appropriate and that an election should be conducted among the seven employees who comprise that unit.

### II DECISION

For the reasons discussed in detail below, it is concluded that the appropriate units in this matter are those contained in the Union's most recent collective-bargaining agreements with the Quad City Builders Association and the Associated Contractors of the Quad Cities. It is further concluded that under *Daniels Construction Co.*, 133 NLRB 264 (1961), there are currently no eligible voters in the appropriate units, and the petition is hereby dismissed.

### III. STATEMENT OF FACTS

The Employer is an Iowa corporation with an office and place of business in Farley, Iowa. The Employer is engaged in the business of providing excavating services in the construction industry. Todd Horsfield is the Employer's owner and founded the company in 2004. His duties include submitting bids for jobs and general management of the company. The Employer employs approximately seven operators at the Farley, Iowa facility including the Petitioner.

About October 28, 2005 the Employer, by its Vice-President James Seymour, entered into a Memorandum of Agreement with the Union which referenced the Quad Cities Builders Association. That Memorandum of Agreement reads in part:

1. The EMPLOYER recognizes the UNION as the sole and exclusive representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION. Prior to recognition, the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of the EMPLOYER.

The Memorandum of Agreement also bound the Employer to the terms of the Union's most recent contract with the Quad City Builders Association and to subsequent contracts with that entity unless either party provided notice of termination under the terms of that contract. The most recent contract between the Union and the Quad City Builders Association is effective from June 1, 2010 through May 31, 2014 and contains the following unit description:

# SECTION 1.1 – RECOGNITION

The Contractors recognize the Union as the sole collective bargaining agent for those employees of the Contractor engaged in the operation and maintenance of all hoisting and portable machines and engines used on building work and excavating work pertaining to or that may be done in preparation, such as grading and improvement of the property or

site, by the Contractor, whether operated by steam, electricity, gasoline, diesel, compressed air or hydraulic power and including all equipment listed in the wage classification contained herein, or any other power machine that may be used by the Contractor for the construction, alteration, repair or wrecking of a building or buildings, in the Counties of Rock Island and Mercer, the west half of Henry and the following described portion of Whiteside County, in Illinois, which shall include all territory in the west portion of Whiteside County from the fifth (5<sup>th</sup>) sectional line east of Morrison, Illinois, running directly north and south, and the Counties of Cedar, Clinton, Des Moines, Lee, Louisa, Muscatine, and Scott in the State of Iowa, except in mortar mixers or concrete mixers 3 ½ S or smaller with no skip attached, pumps other than described in Article XXII. The Contractor will not be held responsible for heating plants over which he has no control when used in the temporary heating of a building under construction. Employees in the bargaining unit herein described are hereinafter referred to as "Employees" or "Engineers" or "Operators".

The record is silent as to the location or type of work being performed by the Employer that led to the signing of the above-described Memorandum of Agreement other than that it occurred in 2005 and was within the territorial jurisdiction of the Union. Following the signing of the Memorandum in 2005, the Employer forwarded no dues or benefit fund payments to the Union for the work being performed within the Union's territorial jurisdiction.

In 2007 The Employer performed additional work within the territorial jurisdiction of the Union although the record is again silent as to the exact location and type of work performed. About August 16, 2007, James Seymour entered into another Memorandum of Agreement on behalf of the Employer with the Union which referenced the Associated Contractors of the Quad Cities. That Memorandum of Agreement reads in part:

1. The EMPLOYER recognizes the UNION as the sole and exclusive representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION. Prior to recognition, the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of the EMPLOYER.

The Memorandum of Agreement also bound the Employer to the terms of the Union's most recent contract with the Associated Contractors of the Quad Cities and to subsequent contracts with that entity unless either party provided notice of termination under the terms of that contract. The most recent contract between the Union and the Associated Contractors of the Quad Cities is effective from June 1, 2010 through May 31, 2014 and contains the following unit description:

In addition the contract contains a map of the Union's geographic jurisdiction.

### SECTION 1.1 – RECOGNITION

The Contractor recognizes the Union as the sole exclusive collective bargaining agency[sic] for those employees of the Contractor engaged in the operation and maintenance of all hoisting and portable machines and engines used in all open and heavy construction work whether operated by steam, electricity, gasoline, diesel, compressed air or hydraulic power, including those machines and similar machines as listed in the wage classifications included herein, used by the Contractor at asphalt, concrete mixing plants, construction materials recycling sites and in the construction, alteration or repair of bridges, streets, alleys, highways, airports, water mains, pipe lines (distribution systems), railroads, and farm improvement work. In addition, work pertaining to locks and dams, levees, docks and drainage soil conservation which relates to the Mississippi River and its tributaries from the Northern boundary of Clinton County in Iowa to the southern boundary of Lee County in Iowa, including Lake Odessa, and on such work, or work which pertains thereto, in the following counties: Scott in Iowa, Rock Island and Mercer County, the west half of Henry and the following described portion of Whiteside County in Illinois; which shall include all territory in the west portion of Whiteside County from the fifth (5<sup>th</sup>) sectional line east of Morrison, Illinois, running directly north and south<sup>3</sup>.

Just as in 2005, the Employer made no contributions in 2007 to the Union's benefit funds on behalf of the employees performing work in the Union's jurisdiction. However, in 2007 the Employer did pay dues to the Union on behalf of the two employees performing that work. Those dues totaled \$358.05.

In 2009 the Employer performed work on another job within the Union's jurisdiction. That job was located in Clinton, Iowa. The Employer had two of its employees employed on that job and hired another employee from the Union's hiring hall. The Employer paid dues to the Union on behalf of its two employees and for the employee from the hiring hall. The Employer also made benefit fund payments to the Union on behalf of the hiring hall employee but not on behalf of its two employees. This job continued into 2010, and the Employer continued to employ two of its employees and the one employee from the hiring hall on the job. The Employer continued to make dues payments to the Union on behalf of all three employees and to make benefit fund payments on behalf of the employee from the hiring hall.

In 2011 following the completion of the job in Clinton, the Employer began work on a sanitary sewer project for the city of Low Moor, Iowa. This work was covered under the Union's contract with Quad Cities Builders Association, but the Employer made no dues or benefit fund payments to the Union for the employees performing the work. The Low Moor job was not completed until sometime in 2012. There was only one employee who worked on the Low Moor project in 2012 who the Employer was certain was an operator, and he was employed on that project for fewer than 20 hours. The Employer has not performed any work within the Union's jurisdiction since the completion of the Low Moor project.

\_

In addition the contract contains a map of the Union's geographic jurisdiction.

On February 26, 2014 the Employer sent the Union a letter denying that it had any collective bargaining agreement with the Union. The letter further stated that in the event such an agreement or agreements did exist, the Employer was terminating and cancelling those agreements. This letter met the criteria for termination set forth in both the Union's most recent collective bargaining agreement with the Quad City Builders Association and the Union's most recent collective bargaining agreement with the Associated Contractors of the Quad Cities.

# IV. DISCUSSION

As set forth above, the parties disagree as to the description of the appropriate unit. The petition contains a requested unit that is different than the unit description set forth in the collective bargaining agreements by which the Employer agreed to be bound. The Petitioner and the Employer contend that the petitioned for unit is appropriate while the Union argues that the appropriate unit is the one set forth in the previously described collective bargaining agreements.

It is well established Board policy that the bargaining unit in which a decertification election is held must be coextensive with the certified or recognized unit. Campbell Soup Co., 111 NLRB 234 (1955); W.T. Grant Co., 179 NLRB 670 (1969); Bell & Howell Airline Service Co., 185 NLRB 67 (1970); WAPI-TV-AM-FM, 198 NLRB 342 (1972); and Mo's West, 283 NLRB 130 (1989). When it signed the Memorandums of Agreement in 2005 and 2007, the Employer recognized the Union as the exclusive collective bargaining representative of its employees within the territorial and occupational jurisdiction of the Union. The Employer also agreed to be bound by two collective bargaining agreements, both of which contained clauses specifically describing what the territorial and occupational jurisdiction of the Union was. Those clauses have been set forth above. Those clauses describe the recognized units in this case.

The Employer contends that it was not bound by the two collective bargaining agreements described in the Memorandums of Agreement between the Employer and the Union. Rather, the Employer argues that its relationship with the Union was governed by several "unwritten" contracts. The Employer cites no evidence or case law for its position that these "unwritten" contracts, even if it existed, affected the recognized unit set forth in the Union's collective bargaining agreements. The evidence at the hearing instead shows that neither party made any attempt to alter the recognized units. There was no evidence that the Union ever attempted to represent any of Respondent's employees or enforce its collective bargaining agreements outside the geographical and occupational jurisdictions set forth in those collective bargaining agreement. Nor was any evidence offered that the Employer objected to the Union's requests regarding dues payment when the Employer's employees were working within the geographical and occupational limits contained in the collective bargaining agreements. Instead, the Union and the Employer followed those geographical and occupational limits in their dealings with each other.

The Employer further asserts that even if the Employer is bound by the contracts described in the Memorandums of Agreement, the bargaining units set forth in those contracts

are somehow not geographically limited.<sup>4</sup> This argument requires a rather convoluted reading of the recognition clauses of those two contracts. A more reasonable interpretation of the recognition clauses shows that they describe certain types of work and certain locations and that in order to be performing bargaining unit work under those collective bargaining agreements, an employee must be both performing the described type of work and must be performing said work in one of the described locations. Unless both criteria are met, the work being performed is not bargaining unit work. Therefore, the appropriate units in this matter are the two units set forth in Section 1.1 of the Union's collective bargaining agreement with the Quad City Builders Association and Section 1.1 of the Union's collective bargaining agreement with the Associated Contractors of the Quad Cities.<sup>5</sup>

At the hearing the parties stipulated that voter eligibility in this matter would be governed by the formula set forth by the Board in *Daniels Construction Co.*, 133 NLRB 264 (1961). Under that case an employee must have worked 30 days in the bargaining unit during the 12 months prior to the election eligibility date or 45 days during the 24 months before said voter eligibility date. Under the *Daniels* formula, there are no eligible voters in the appropriate unit. No employees have performed any bargaining unit work since at least 2012, and the evidence does not indicate that any employee performed even close to 45 days on bargaining unit work at the Low Moor project in 2012. Therefore, there are no eligible voters in this matter, and the petition shall be dismissed.

### V. ORDER

Accordingly, the petition to decertify the Union as the exclusive collective bargaining representative of certain of the Employer's employees is hereby dismissed.

# VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC

\_

The Employer also asserts that the relationship between the Employer and the Union created by the Memorandums of Agreement was one governed by Section 8(f) of the Act and not Section 9(a). However, the language in the Memorandums of Agreement was clearly sufficient to establish a Section 9(a) relationship between the Employer and the Union. *Staunton Fuel & Material*, 335 NLRB 717 (2001).

<sup>&</sup>lt;sup>5</sup> As set forth above, on February 26, 2014 the Employer effectively terminated both of those contracts. Thus, when both contracts expire on May 31, 2014, neither would serve as a bar to any future decertification petition.

by close of business on **May 19, 2014**, at 5:00 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at <a href="www.nlrb.gov">www.nlrb.gov</a>. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

SIGNED IN Indianapolis, Indiana, this 5th day of May 2014.

Rik Lineback Regional Director National Labor Relations Board Region 25, Subregion 33 Room 238, Minton-Capehart Building 575 North Pennsylvania Street Indianapolis, IN 46204-1577

mtb

<sup>&</sup>lt;sup>6</sup> A request for extension of

<sup>&</sup>lt;sup>6</sup> A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.